

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

No. 11-668V

Filed: April 25, 2013

DAVID BECKNER,

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Petitioner,

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v.

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Proof of Vaccination

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SECRETARY OF HEALTH
AND HUMAN SERVICES,

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Respondent.

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Isaiah Kalinowski, Esq., Maglio Christopher & Toale, Sarasota, FL, for petitioner.
Chrysovalantis Kefalas, Esq., U.S. Dep't of Justice, Washington, DC, for respondent.

FACT RULING AND ORDER¹

Vowell, Special Master:

On October 12, 2011, David Beckner ["petitioner"] filed a Petition for Vaccine Compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, et seq.² [the "Vaccine Act" or "Program"]. Petitioner alleges that he suffers from optic neuritis as the result of a trivalent influenza ["flu"] vaccination he received at his place of work, the Ram-Powell offshore facility ["the Ram-Powell"],³ on October 19, 2008. Petition at ¶¶ 1, 3. Further, petitioner alleges that his vaccine-related injuries have lasted more than six months. *Id.* at ¶ 6.

¹ Because this ruling contains a reasoned explanation for my action in this case, I intend to post this ruling on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire ruling will be available to the public.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

³ The Ram-Powell offshore facility is located in Viosa Knoll, within the Gulf of Mexico, south of Mobile, Alabama. Petition at ¶ 1. The facility is owned and operated by the Shell Oil Company ["Shell"]. Status Report, filed May 11, 2012.

Petitioner did not file any supporting documentation with his petition. Since filing his petition, he has submitted several sets of medical records. To date, however, petitioner has not filed any records reflective of the actual vaccination. To support his claim that he received the flu vaccine, petitioner relies on his own averments in his affidavit and those set forth in the affidavits of two witnesses. Petitioner also relies on the medical records he has filed to date. Asserting that the petition should be dismissed, respondent challenges the sufficiency of petitioner's evidence, highlighting several evidentiary problems, including a discrepancy as to when the vaccination occurred.

After considering the record as a whole, and for the reasons explained below, I find that petitioner received a flu vaccination between October 19, 2008 and November 4, 2008.

I. Procedural History.

On October 26, 2011, I ordered petitioner to file an amended petition that clearly identified which sub-clause of § 11(c)(1)(B)(i)⁴ he relied upon and provided support to establish jurisdiction. Petitioner filed an amended petition on November 30, 2011.⁵ In addition to indicating on which sub-clause of § 11(c)(1)(B)(i) he relies, petitioner also stated in his amended petition that he "has not yet recovered the vaccination record from his employer, but will file [it] posthaste as soon as it is recovered." Amended Petition at ¶ 1.

Petitioner filed several sets of medical records on November 22, 2011. Petitioner's Exhibits ["Pet. Exs."] 1-5. Noticeably missing from these records was documentation of vaccination. On January 30, 2012, petitioner filed the affidavit of an offshore drilling facility medic who recalls administering the flu vaccine to petitioner on October 19, 2008. Pet. Ex. 6 at ¶ 3.

On March 16, 2012, respondent filed her Rule 4(c) report ["Resp. Report"] in which she argues that petitioner's evidence in support of vaccination is insufficient to satisfy his burden of proof and thus that his petition must be dismissed. Resp. Report at 7.⁶

⁴ Section 11(c)(1)(B)(i), in conjunction with its sub-clauses, concerns the situs of vaccine receipt. For example, § 11(c)(1)(B)(i)(I) holds that a Program petition must contain "an affidavit, and supporting documentation, demonstrating that a person who suffered [a vaccine-related] injury" from "a vaccine set forth in the Vaccine Injury Table— received the vaccine in the United States or in its trust territories."

⁵ On November 28, 2011, petitioner filed a first amended petition which did not directly address the jurisdictional issues I ordered petitioner to clarify. Following petitioner's filing of a second amended petition on November 30, 2011, I ordered him to file either a memorandum of law explaining how his second amended petition satisfies § 11(c)(1)(B)(i) or a third amended petition predicated upon § 11(c)(1)(B)(i)(III). Petitioner filed a memorandum of law on January 30, 2012.

⁶ In her report, respondent did not assert a jurisdictional challenge based on the situs of vaccine receipt.

During a status conference to discuss respondent's report, held on April 4, 2012, petitioner's counsel stated that he had exhausted all efforts to obtain petitioner's vaccination record.⁷ On the same day, I ordered him to file additional documentation regarding the administration of petitioner's flu vaccine by June 4, 2012. On April 5, 2012, petitioner requested and was granted authority to issue a subpoena to Shell for the purpose of obtaining any and all records concerning his care and treatment.

Petitioner filed a status report on May 11, 2012, in which he stated that his co-workers, who had received vaccinations on the same day as petitioner and had requested their own records at petitioner's urging, had been notified by Shell that the vaccination records had been destroyed after two years of preservation. Status Report at ¶ 2. On the same day, petitioner filed his medical records from Shell (Pet. Ex. 7) which "reference the vaccination at issue, but do not include the vaccination record from the time of administration." *Id.* at ¶ 3. Because these records "also reference the health care company that Shell contracted with to provide health services (including vaccination) to the workers aboard the Ram Powell," petitioner requested records from that company, Acadian Ambulance Service ["Acadian"]. *Id.* at ¶ 4. On June 4, 2012, petitioner filed a letter from Acadian's records custodian indicating that she located no records for petitioner. Pet. Ex. 8.

On August 16, 2012, petitioner filed another status report regarding proof of vaccination. In this report, petitioner noted his receipt from Shell of two vaccination forms, a completed form from 2003, and a 2008 form containing only the lot number AFLUA359AA. Pet. Exs. 9 and 10, filed Aug. 17, 2013.⁸ Petitioner provided the lot number to aid respondent in searching the vaccine database for record of petitioner's vaccination.

On October 5, 2012, petitioner filed the affidavit of a former co-worker who remembers receiving the flu vaccine on the same day as petitioner. Pet. Ex. 11 at ¶¶ 2, 3. Thereafter, on November 19, 2012, petitioner filed a notice in which he stated that his efforts "to recover a more detailed record of vaccination administration from Shell Oil Company were unavailing." Notice of Compliance at ¶ 4. Petitioner further stated his belief that the record contains sufficient proof that "the vaccination at issue took place as described in the Petition."⁹ *Id.* at ¶ 8.

⁷ During the status conference, respondent confirmed she has no concerns about petitioner's compliance with § 11(c)(1)(B)(i).

⁸ In a notice of compliance, filed November 19, 2012, petitioner states that Shell "sent him a completed consent form/vaccination record from 2003, and a nearly blank vaccination form, for which the only information completed was the lot number AFLUA359AA." The 2003 form is signed and dated by both petitioner and "D. Barr," the administrator of the vaccine. Pet. Ex. 9, p. 1. The 2008 form, however, does not contain any names, signatures, or handwritten dates. It contains only a typed lot number.

⁹ Petitioner's notice also contains the statement that his affiant, Bobby Rayborn, after submitting his affidavit, "received correspondence from Shell Oil Company stating that, if he was to hear from Petitioner's Counsel in this matter, he was not to cooperate, but was instead commanded to refer all such inquiries to [Shell's] Human Resources department without further comment or assistance." Notice of Compliance at ¶ 6.

A status conference was held on December 6, 2012, during which respondent suggested that she issue a subpoena to Shell to obtain petitioner's records. Thereafter I authorized respondent to serve a subpoena on Shell and ordered her to file a status report updating the court on her efforts to recover petitioner's records. Orders, issued Dec. 7, 2012. Respondent filed a status report on February 5, 2013. In her report, respondent conveyed a message from Shell's managing counsel that the company has not been able to locate petitioner's relevant vaccination record despite repeated efforts.¹⁰

I held another status conference on March 13, 2013. During this conference, respondent requested a fact ruling on the record to resolve the issue of whether petitioner received the flu vaccine as alleged. Both parties waived the right to a fact hearing to address the issue. On April 19, 2013, petitioner filed his own affidavit, completing the record for the purposes of this ruling. My factual findings are set forth in Section VI below.

II. Scope of this Ruling.

The record in this case consists of medical records, petitioner's affidavit, and affidavits from two witnesses who swear to having been present when petitioner allegedly received the flu vaccine in question on October 19, 2008. Petitioner contends that the evidence in the record is sufficient to satisfy petitioner's burden. Respondent disagrees. In this ruling I address respondent's challenge to the sufficiency of petitioner's evidence in support of vaccination.

III. The Record.

A. Petitioner's Relevant Medical Records.

On November 3, 2008, petitioner reported to Dr. James Crittenden, complaining of fatigue and loss of energy. Pet. Exs. 3, p. 28; 5, p. 58. The record of this visit contains no notation about a flu vaccine. *Id.* Recording his impression that petitioner was suffering from retinopathy, Doctor Crittenden referred petitioner to Dr. Frere Gremillion at the VitreoRetinal Eye Center. Pet. Ex. 3, p. 28; see *also* Pet. Ex. 2, p. 40.

Petitioner was seen by Dr. Gremillion on the same day. Pet. Ex. 2, pp. 38-44. At this visit, petitioner's chief complaint was "VA [visual acuity] OD [right eye] blurry since this weekend." *Id.*, p. 40. Doctor Gremillion's impression was "[o]ptic neuropathy / [n]euritis OD [right eye]" and "CR [chorioretinal] scar OD [right eye] may likely be

¹⁰ Respondent filed an e-mail from Shell's Managing Counsel, Michael Beckwith, on February 13, 2013. Respondent's Exhibit A. Mr. Beckwith's e-mail confirms respondent's conveyance in her February 5, 2013 status report. Additionally, his e-mail contains the representation that Shell "never intended to prevent interviews of anyone from occurring."

[secondary] to viral.” *Id.*, p. 41. The records of this visit also contain no notation concerning a flu vaccine.

Petitioner was seen by Dr. Crittenden on November 10 and November 12, 2008. Pet. Ex. 3, pp. 13-14. On November 14, 2008, he was seen by Dr. Gremillion. Pet. Ex. 2, pp. 31-37. Like the records from the previous visit, the records from these visits contain no notation concerning a flu vaccine.

On November 17, 2008, about a month after petitioner’s alleged receipt of the flu vaccine, petitioner was admitted to the Hancock Medical Center [“Hancock”] “for 72 hours of steroids.” Pet. Ex. 5, p. 58. A medical history taken on the date of admission includes the notations “Flu Shot Reaction” and “started after Flu Shot.” *Id.*, p. 59. On the same day, petitioner was seen by Dr. Crittenden. Pet. Ex. 3, p. 27. Doctor Crittenden’s impression at this time included “[r]eaction to flu shot.” *Id.*; see also, Pet. Ex. 5, pp. 59, 62, 67. During his stay at Hancock, petitioner underwent a chest X-ray. Pet. Ex. 3, p. 37. The reason for the procedure was “flu shot reaction viral retinopathy.” *Id.*

On November 18, 2008, petitioner was seen by Dr. Gremillion. Pet. Ex. 5, p. 61. On a consultation report Dr. Gremillion wrote: “57 [year old white male with] bilateral nerve edema/swelling—recently (within 2 weeks) had an influenza vaccination.” *Id.*

Petitioner was discharged from Hancock on November 20, 2008. See Pet. Ex. 5, p. 58. In his discharge summary, Dr. Crittenden noted, “[t]he patient possibly had a viral syndrome possible complications of the flu shot since his problems with fatigue and the eyesight was noticed approximately 3 weeks after the flu shot.” *Id.* Among petitioner’s discharge diagnoses, Dr. Crittenden noted “[p]ossible complications of flu shot.” *Id.*¹¹ Additionally, a discharge summary form contains a note that “[patient] already had [the flu vaccine]. Date_2008_____.” Pet. Ex. 5, p. 101. A similar note, dated November 17, 2008, appears below on the discharge form. In response to the question “Would you like to receive pnueumoccal [sic] or influenza vaccines?,” is the typed notation, “Influenza received. Date_2008_____.” *Id.*, p. 102; see also, *id.*, p. 79.

On January 13, 2009, petitioner was examined by ophthalmologist Dr. Marie Acierno. Pet. Ex. 4, p. 2. In a letter to petitioner’s referring doctor written two days later, Dr. Acierno conveyed petitioner’s report “that he received the vaccine for influenza on October 19, 2008.” *Id.* She added that petitioner developed “a flu-like illness” within 24 hours of receiving the vaccine and also had pain associated with eye movements in the two weeks following the shot. *Id.* Reporting her impression, Dr. Acierno noted the possibility that petitioner’s “bilateral anterior optic neuritis is related to his influenza vaccine.” *Id.*, p. 3.

¹¹ Petitioner’s records from Dr. Crittenden contain additional references to the flu shot. See Pet. Ex. 3, pp. 5, 11, 12. One record contains the note “visual loss [secondary] to viral (flu shot).” *Id.*, p. 25.

Petitioner returned to Dr. Gremillion on January 23, 2009. Pet. Ex. 2, p. 14. During this visit he reported that he saw Dr. Acierno and “will never go back to her again.” *Id.* He added that Dr. Acierno “thought I was there to sue the flu shot people.” *Id.*

At some time after February 3, 2009, petitioner drafted a timeline of his eye problems. Pet. Ex. 7, pp. 50-51.¹² Petitioner noted that on October 19, [2008], at around 9:00 a.m., he received the flu shot at Ram-Powell. *Id.*, p. 50. According to petitioner, he “got sick with flu like symptoms” at 1:00 a.m. on October 20, [2008]. *Id.*

Petitioner was seen by Dr. Thomas Whittaker on July 2, 2009. Pet. Ex. 1, pp. 1-9. Doctor Whittaker’s records from this visit include a timeline written on a medical history questionnaire, which includes the note, “19 Oct 2008 –flu shot –that evening – fever, chills and pain [with] EOM [extraocular movement].” *Id.*, p. 3. In his letter to petitioner’s referring doctor, Dr. Whittaker wrote that petitioner’s issue was whether his optic neuropathy was vaccine-caused or due to another entity. *Id.*, p. 1.

B. Affidavits.

In addition to his own affidavit (Pet. Ex. 12), petitioner filed two affidavits to support his claim that he received the flu vaccine on October 19, 2008. The earlier-filed affidavit is that of Davy Barr, an offshore drilling facility medic. Pet. Ex. 6. Bobby Rayborn, a former co-worker of petitioner’s aboard the Ram-Powell, also offered a sworn statement on petitioner’s behalf. Pet. Ex. 11.

Petitioner states that he received the flu vaccine on the Ram-Powell at 9:00 a.m. on October 19, 2008. Pet. Ex. 12 at ¶ 1. He adds that at approximately 1:00 a.m. on October 20, he awoke with “high fever, chills, sweating, and soreness in both eyes” and called Mr. Barr, the Ram-Powell medic who had administered the flu vaccine to petitioner. *Id.* at ¶ 2. Petitioner states that he was unable to work on October 20, was monitored by Mr. Barr throughout the day, and, due to his “emergent and worrisome symptoms,” was transported via helicopter to Boothville, Louisiana on October 21. *Id.* at ¶¶ 2, 3. He states that he returned to work on November 4, 2008, after having been seen in the interim by his primary care physician, Dr. Crittenden, and a specialist, Dr. Gremillion.¹³ *Id.* at ¶¶ 4, 5, 6.

In his affidavit, Mr. Barr states his recollection that he administered the flu vaccine to petitioner on October 19, 2008, while aboard the Ram-Powell. Pet. Ex. 6 at ¶ 3. Additionally, Mr. Barr remembers giving petitioner Ibuprofen later on the night of October 19, after petitioner complained of flu-like symptoms. *Id.* at ¶ 4.

¹² This typed timeline, filed with the records produced by Shell, spans the date range of October 19, 2008 to February 3, 2009, but contains no notation indicating the date of creation.

¹³ Petitioner states that on November 3, 2008, he was seen by Dr. Crittenden and referred to Dr. Gremillion. Pet. Ex. 12 at ¶ 4. Petitioner does not specify the date on which he was seen by Dr. Gremillion. *Id.* at ¶ 5.

Unlike Mr. Barr, Mr. Rayborn does not specify the date on which he witnessed petitioner's receipt of the flu vaccine. See Pet. Ex. 11. Mr. Rayborn does state, however, that he was working on the Ram-Powell in October 2008 (*Id.* at ¶ 1), and, further, that he received the flu vaccine on the same day as petitioner in the onboard medical facility (*Id.* at ¶¶ 2, 3). He adds that the optional vaccination is offered every year and that, knowing of petitioner's side effects, he did not take the vaccine the following year. *Id.* at ¶¶ 6, 7. Finally, Mr. Rayborn states that following his request for his own 2008 vaccination record, he was told by a Shell nurse that there was no record of his vaccination. *Id.* at ¶ 8.

IV. Respondent's Contentions.

Respondent filed her Rule 4(c) report on March 16, 2012, before petitioner's filing of the blank 2008 flu consent form, the affidavit of Mr. Rayborn, and petitioner's own affidavit. In her report, respondent states that "[s]ince petitioner has failed to present sufficient, corroborating evidence that makes it more probable than not that he received an influenza vaccination on October 19, 2008, his Petition must be dismissed." Resp. Report at 7. Specifically, respondent argues that there are four problems with petitioner's evidence:

First, [Mr. Barr's] affidavit was given more than three years after Mr. Barr allegedly administered the vaccination. Second, it is unclear how Mr. Barr remembered administering the vaccination to petitioner on the specific date of vaccination. Third, there is more than a two-week discrepancy as to when the alleged vaccination occurred. On November 18, 2008, Dr. Gremillion dated the vaccination "within two weeks" (between November 4 and 18) while the petitioner and affidavit by Mr. Barr maintain that petitioner received the vaccination on October 19, 2008. Pet. Ex. 5, at 61; Pet. Ex. 2 at 38; Pet. Ex. 6 at 1. Fourth, petitioner has not provided an affidavit, as required by Vaccine Rule 2, documenting the efforts to obtain proof of vaccination and why he has been unable to provide a vaccination record.

Resp. Report at 6. Respondent argues in light of these issues that "reliable evidence appears lacking." *Id.* at 7.

On March 13, 2013, after petitioner filed additional evidence, respondent requested a fact ruling on the issue of vaccination, thus re-conveying her contention that petitioner has not produced sufficient evidence to satisfy his burden.

V. Applicable Legal Standards.

The Vaccine Act requires a petitioner to prove he “received a vaccine” by a preponderance of the evidence. §§ 11(c)(1); 13(a)(1)(A). Under this standard, the special master, before finding in favor of the party with the burden to prove a fact’s existence, must “believe that the existence of a fact is more probable than its nonexistence.” *Moberly v. Sec’y, HHS*, 592 F.3d 1315, 1322 n.2 (Fed. Cir. 2010) (internal citations omitted).

In determining the persuasiveness of the evidence, the special master must assess “the record as a whole” and may not find that a petitioner received a vaccine “based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.” § 13(a)(1). Vaccine Rule 2 holds, in accordance with § 11(c), that a petition shall be accompanied by “all available medical records supporting the allegations in the petition, including physician and hospital records relating to: the vaccination itself.” Vaccine Rule 2(c)(2)(A)(i).

Although contemporaneous documentation of vaccination from a health care provider is the best evidence, its production is not an absolute requirement. See *Centmehaiey v. Sec’y, HHS*, 32 Fed. Cl. 612, 621 (1995) (“The lack of contemporaneous, documentary proof of a vaccination . . . does not necessarily bar recovery.”). Vaccine Rule 2 states that “[i]f the required medical records are not submitted, the petitioner must include an affidavit detailing the efforts made to obtain such records and the reasons for their unavailability.” Vaccine Rule 2(c)(2)(B)(i). Furthermore, if petitioner’s claim is “based in any part on the observations or testimony of any person, the petitioner should include the substance of each person’s proposed testimony in a detailed affidavit(s) supporting all elements of the allegations made in the petition.” Vaccine Rule 2(c)(2)(B)(ii).

Special masters have found in favor of vaccine administration where strictly contemporaneous documentation of vaccination is unavailable. In such cases, preponderant evidence has been found in later medical records and/or witness testimony. For example, corroborative, though backward-looking medical notations have been found to tip the evidentiary scale in favor of vaccine receipt. See *Wonish v. Sec’y, HHS*, No. 90-667V, 1991 WL 83959, at *4 (Cl. Ct. Spec. Mstr. May 6, 1991) (finding parental testimony “corroborated strongly by medical records [referring] back to the [vaccination]” to be sufficient to establish vaccine administration); *Groht v. Sec’y, HHS*, No. 00-287V, 2006 WL 3342222, at *2 (Fed. Cl. Spec. Mstr. Oct. 30, 2006) (finding a treating physician’s note—“4/30/97—Hep B. inj. # 1 (not given here) (pt. wanted this to be charted)” —to be sufficient proof of vaccination); *Lamberti v. Sec’y, HHS*, No. 99-507V, 2007 WL 1772058, at *7 (Fed. Cl. Spec. Mstr. May 31, 2007) (finding multiple medical record references to vaccine receipt to constitute adequate evidence of administration).

Addressing the value of medical records in general, the Federal Circuit has noted that such records “warrant consideration as trustworthy evidence.” *Cucuras v. Sec’y,*

HHS, 993 F.2d 1525, 1528 (Fed. Cir. 1993).¹⁴ The Circuit added that “[t]he records contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions. With proper treatment hanging in the balance, accuracy has an extra premium.” *Id.*

In addition to corroborative medical records, lay testimony alone has been found to be a sufficient basis for finding that a vaccine was administered as alleged. *Alger v. Sec’y, HHS*, No. 89-31V, 1990 WL 293408, at *2, *7 (Cl. Ct. Spec. Mstr. Mar. 14, 1990) (finding oral testimony from a parent and the doctor who administered the vaccine to be “more than adequate to support a finding that the vaccine was administered”).¹⁵ In *Alger*, petitioners testified in person and the doctor who administered the vaccine to their child testified via the telephone. 1990 WL 293408, at *1. When a special master has the opportunity to question a witness and observe his or her demeanor, she is able to better assess credibility. When she does not have the opportunity, however, determinations of credibility are more difficult. In either case, where later-given testimony conflicts with medical records created closer in time to the events in question, special masters frequently accord more weight to the medical records. See *Reusser v. Sec’y, HHS*, 28 Fed. Cl. 516, 523 (1993) (“[W]ritten documentation recorded by a disinterested person at or soon after the event at issue is generally more reliable than the recollection of a party to a lawsuit many years later.”).

The Claims Court, based on a special master’s report, has also found in favor of vaccine administration in the absence of strictly contemporaneous documentation. *Brown v. Sec’y, HHS*, 18 Cl. Ct. 834, 839-40 (1989) (finding a mother’s testimony, her personal calendar, and a charge for the vaccine on the physician’s billing statement to constitute sufficient proof of vaccination), *rev’d on other grounds*, 920 F.2d 918 (Fed. Cir. 1990). Decisions issued by special masters and judges of the Court of Federal Claims, however, constitute persuasive, but not binding authority. *Hanlon v. Sec’y, HHS*, 40 Fed. Cl. 625, 630 (1998).

VI. Findings of Fact.

Petitioner has extensively detailed his efforts to obtain his vaccination record. Respondent too has attempted to obtain a vaccination record from petitioner’s employer, but with no success. Nevertheless, based on the record as a whole, I find

¹⁴ In *Cucuras*, Judge Rader, affirming the special master’s reliance on medical records to determine the onset of injury, highlighted a record containing the parental report that the patient had a “2 week history of ‘spells.’” 993 F.2d 1525, 1528. The reference to this record appears just before the Court’s discussion of the value of medical records “in general.” Thus, it is apparent that the Court intended to include records that are not strictly contemporaneous with the events in question under the umbrella of “trustworthy evidence.”

¹⁵ See also *Berry v. Sec’y, HHS*, No. 90-339V, 1990 WL 293448 (Cl. Ct. Spec. Mstr. Nov. 15, 1990); *Taylor v. Sec’y, HHS*, No. 90-857V, 1991 WL 115031 (Cl. Ct. Spec. Mstr. June 12, 1991).

that it is more likely than not that petitioner received a flu vaccine between October 19, 2008 and November 4, 2008.¹⁶

The first mention of the flu vaccine in petitioner's medical records was on November 17, 2008, when petitioner was admitted to Hancock. Pet. Ex. 5, p. 59. Although this record was created nearly a month after petitioner's alleged receipt of the flu vaccine, it constitutes trustworthy evidence. Petitioner's report of his vaccination was made to a health care professional for the purpose of facilitating diagnosis and treatment of his condition. At the time, accuracy was of utmost importance. Moreover, the vaccination was received in such close temporal proximity to petitioner's admission that misremembering is unlikely.

Additionally, petitioner's medical records corroborate his own averments and the statements of his affiants. A written statement from a former co-worker who remembers being in line to receive the flu vaccine with petitioner and who recalls hearing of petitioner's reaction provides circumstantial evidence that petitioner did in fact receive the vaccine. Moreover, a statement from the medic who remembers administering the vaccine to petitioner provides even stronger support.

That petitioner received the flu vaccine is evident from witness statements and corroborating medical records. Whether he received the vaccine on October 19, 2008, or at a later date, however, is a more difficult question.

Petitioner and his affiant, Mr. Barr, both cite October 19, 2008, as the date of administration. Pet. Exs. 12 at ¶ 1; 6 at ¶ 3. The medical records do not contain such specificity. On November 18, 2008, Dr. Gremillion noted that petitioner received the vaccine "within two weeks." Pet. Ex. 5, p. 61. Presumably he meant within two weeks of the date of the visit, which would place vaccination between November 4 and November 18. No other record suggests an outer limit of vaccine receipt beyond November 18, 2008. A 2008 calendar shows that November 18 was a Tuesday. It is unlikely that petitioner would have reported (and Dr. Gremillion would have recorded) a date range of two weeks had he received the vaccine the previous week (November 10-16). Moreover, petitioner had three doctor visits on three different days during the previous week, the records of which do not contain mention of vaccine administration. Pet. Exs. 3, pp. 13, 14; 2, pp. 31-37. Thus, I find that petitioner received the flu vaccine between October 19, 2008 and November 4, 2008.

VII. Conclusion.

Based on the record as a whole, including petitioner's medical records, his affidavit, and the affidavits of two witnesses, I find that petitioner received the flu vaccine between October 19, 2008 and November 4, 2008.

¹⁶ At this juncture, I will not attempt to pinpoint the exact date on which petitioner received the flu vaccine. If the date of vaccination becomes a pivotal issue as the case proceeds, I will make my finding at the appropriate time.

During the March 13, 2013 status conference, petitioner stated that he will need 30-60 days from the issuance of this ruling to prepare a settlement demand. As soon as reasonably possible, and by no later than **Friday, June 21, 2013**, petitioner shall file a status report indicating that a demand has been made and updating the court on the status of settlement discussions.

IT IS SO ORDERED.

s/Denise K. Vowell
Denise K. Vowell
Special Master